U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 07 December 2006

BALCA Case No.: 2006-INA-00058
ETA Case No.: D-04310-31399

In the Matter of:

RS SOFTWARE (INDIA) LTD.,
Employer,

on behalf of

RAJEEV OJHA,
Alien.

Appearance: Nathan A. Waxman, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Jenny Elser
Dallas, Texas

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER OF REMAND

This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer of an application for alien employment certification. Permanent alien employment certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and Title 20, Part 656 of the Code of Federal Regulations. We base our decision on the record upon which the Certifying Officer ("CO") denied certification and the

Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On November 21, 2002, RS Software (India) Ltd., ("the Employer") filed an application for labor certification to enable the Alien to fill the position of Systems Analyst. (AF 76). The position description contained in the ETA 750A required a Bachelor's Degree or its equivalent in Computer Science, MIS, Math, Business or Engineering, and one year of experience in the job offered. The job duties were described as "Under supervision, develop, upgrade, troubleshooting and maintenance of customer specific software systems using COBOL, CICS, VSAM and DB2 in IBM mainframe environment." The Employer requested Reduction in Recruitment ("RIR") processing. (AF 73-74). In support of its RIR request, the Employer proffered several pre-application Internet and print media advertisements.

In a Notice of Findings dated May 12, 2006, the CO observed that the print advertisements included a laundry list of skill-set requirements that went well beyond the computer skill requirements stated in the ETA 750A, that the Alien's work history stated on the ETA 750B did not illustrate that he had such extensive computer skill sets, and that the recruitment report was short on details. (AF 48-52).

In rebuttal, the Employer argued that its advertisements were "real world" advertisements, and that "no reasonable reader of those ads could possibly have believed the 'laundry list' menu of distinct and, indeed, virtually incompatible skill mixes could possibly describe a single, unitary job." (AF 33-34). The Employer submitted advertisements from other employers to try to establish that its advertisements were typical for the industry. The Employer indicated that the Alien possessed the skill set stated in the ETA 750A, and that it was obviously unlikely that any prospective employee would possess the numerous distinct qualifications listed in its recruitment advertisements. (AF 34-35). In regard to the recruitment report, the Employer stated that

it received 14 applicants, 9 of whom were from overseas, 3 of whom did not possess the required COBOL/DB2 mix, and two of whom were offered positions in H-1B status, neither of whom worked for very long before leaving employment with RS. (AF 35)

On August 1, 2006, the CO issued a Final Determination denying labor certification. (AF 16-20). The CO was not convinced by the Employer's contention that applicants would have known that its advertisements were describing several positions and that they were not requiring an applicant to possess all of the stated skill sets. The CO noted that the original recruitment report had stated that the Employer had received no relevant resumes, but the rebuttal "clarified" that it had received 14 resumes. The CO observed that the Employer had stated only that 9 of the resumes were from "overseas" but had not indicated whether these overseas applicants were nonetheless U.S. workers. The CO found that the rebuttal simply was not clear as to precisely how many, if any, of the applicants were U.S. workers, whether they were interviewed, whether they were considered for the job which is the subject of the present labor certification application, or whether the applicants were rejected solely for a specific, lawful job related reason. The CO stated that because the Employer did not request a remand for supervised recruitment if its RIR request was denied, she would "make its determination on the employer's application 'as is.'" (AF 20). Thus, the CO denied the application outright.

The Employer requested BALCA review by letter dated August 30, 2006. (AF 11-14). The Employer reiterated the arguments it made earlier about the adequacy of its pre-application recruitment, and expressed "shock" by the CO's unilateral decision not to remand for supervised recruitment as a deviation from long-standing prior practice.

DISCUSSION

Twenty C.F.R. § 656.21(i) provides that a CO may reduce or eliminate an employer's recruitment efforts if the employer successfully demonstrates that it has adequately tested the labor market with no success at least at the prevailing wage and working conditions. The purpose of the RIR regulations is to expedite applications in

occupations where there is little or no availability of U.S. workers. This panel has held that a CO's decision whether or not to grant a RIR is reviewed under an abuse of discretion standard. *Solectron Corp.*, 2003-INA-144 (Aug. 12, 2004).

We have closely examined the pre-application print media advertisements used by the Employer to support its RIR request. Those advertisements state a laundry list of skill sets far beyond those identified in the ETA 750A. They in no way indicate that applicants needed only to have some of the skills to be considered for the position or positions offered (the position not being identified). The advertisements were plainly inadequate to document an adequate test of the labor market for the job for which labor certification is now sought. We also agree with the CO that the recruitment report was far too vague to document that U.S. workers were given full consideration and only rejected for reasons considered lawful and job-related under the labor certification regulatory process. Thus, the CO clearly did not abuse her discretion in declining to accept the pre-application recruitment as meriting a reduction in recruitment, and we affirm the CO's Final Determination insofar as it, in effect, denied the RIR.

In this case, however, the CO not only denied the RIR request, but also denied the application outright. In *Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such denial should result in the remand of the application to the local job service for regular processing.

The ground provided by the CO for denying the application outright rather than "remanding"[1] for supervised recruitment was that the Employer had not expressly requested such a remand. The CO cited no legal authority to support this action and we know of none. The RIR regulation provides that "unless the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer shall return the application to the local (or State) office so that the employer might recruit workers to the extent required in the Certifying Officer's decision." 20 C.F.R. §

[1] Under current procedure, supervised recruitment would probably be managed by a federal Backlog Elimination Center rather than a State Workforce Agency. *See* 69 Fed. Reg. 43716 (July 21, 2004) (Interim Rule permitting centralized processing of labor certification applications).

656.21(i)(5) (emphasis added). The regulation, therefore, is mandatory, and does not suggest that the CO can add an arbitrary requirement that the Employer have specifically requested that the matter be referred for supervised recruitment if the RIR is denied.

This panel has recognized that there are exceptions to the remand rule, such as where an employer fails to comply with a deadline set by the CO for responding to the CO's inquiries about the RIR request, *Houston's Restaurant*, 2003-INA-237 (Sept. 27, 2004), or where the application is so fundamentally flawed that a remand would be pointless (such as where the employer has not set forth a *bona fide* job opportunity). *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004). In this case, however, neither of those exceptions is applicable. The faults with the RIR request were solely grounded in the fact that the Employer's pre-application recruitment efforts were insufficient to permit the CO to conclude that it had adequately tested the labor market prior to applying for labor certification.

ORDER

The Certifying Officer's denial of reduction in recruitment is **AFFIRMED.** The Final Determination denying labor certification, however, is **VACATED** and this matter is **REMANDED** for regular labor certification processing.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, D.C. 20001-8002

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typed pages. Upon the granting of a petition the Board may order briefs.